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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

**No. 520**

L. T. BARRINGER AND COMPANY,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, THE ATCHISON,  
TOPEKA AND SANTA FE RAILWAY COM-  
PANY, *et al.*,

*Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF TENNESSEE.

**PETITION OF APPELLANT FOR REHEARING**

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**PETITION OF APPELLANT FOR REHEARING**

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*To the Honorable the Chief Justice and the Associate Jus-  
tices of the Supreme Court of the United States:*

Appellant respectfully applies, pursuant to Rule 33 of  
the Revised Rules of this Court, for a rehearing of the  
decision of this Court in the above-entitled cause on the  
grounds (a) that the Court failed to consider and dispose  
of substantial questions as to the sufficiency of the Com-

mission's findings; and (b) that in disposing of the case under Section 2, the Court has not had the benefit of oral argument on the precise point decided in the opinion of the majority; that the effect of the decision is to overrule prior cases in this Court long considered as controlling authorities, although there is no clear statement to the effect in the opinion; and that the opinion of the majority rests on a misapprehension of the force and significance of the cases cited therein. These will be treated in the order stated.

#### THE LACK OF ADEQUATE FINDINGS

The opinion of the Court fails to consider and dispose of appellant's contention that the order, and ultimate conclusion of the Commission is not supported by adequate findings regarding the claimed differences as to either truck competition or relative rate levels.

In the case of the claimed differences in truck competition, the defect rests on the absence from the report of any statement whatsoever as to the existence of truck competition from Oklahoma gin points<sup>1</sup> to the Texas ports. (See appellant's principal brief, pp. 27-28; reply brief, pp. 19-21.) The opinion of the majority apparently proceeds on the assumption that the Commission made such a finding. The dissenting opinion of Mr. Justice Douglas states definitely that the Commission found that "there is considerable truck competition in the movement of cotton from Oklahoma to the Texas Gulf ports." It thus appears that all members of the Court labored under a misapprehension as to this lack of a finding as to a factual matter

<sup>1</sup> The loading charge in issue applied *only* at the gin origin at the inception of the gin-to-compress move. Consequently, any statement as to truck competition from an Oklahoma compress to the Texas Gulf ports does not touch the real case.

which the Court treated as controlling within the discretion of the Commission.

Furthermore, the Court overlooked the finding in the report of the Commission that the keen truck competition is from gin origin to compress point (R. 24, 248 I.C.C. 649). That finding is actually as to a similarity of conditions, since such competition is encountered to an equal degree by all cotton, regardless of ultimate destination.

With regard to the finding that the "rates to the Southeast are already lower relatively than they are to the Texas ports," appellant contends that a finding so phrased is without significance and effect, a question not considered in the opinion of the Court.

Accepting, *orguendo*, the views of the majority as to relevancy, the matter of relative rate levels bears directly upon the particular discrimination in issue only if the line-haul rates to the Southeast are lower in relation to cost, or some other accepted transportation standard, than are the line-haul rates to the Texas ports. Only in such a case could the Commission rationally conclude that the addition of a loading charge to such subnormal rates would produce an aggregate charge which would not be out of line with the aggregate to the Texas ports when measured by the same standard, so as to excuse the apparent discrimination.

The theory of the majority opinion is that appellant is not injured and has no right to relief if the same change might have been fairly made in the line-haul rates. While it is not stated in the opinion, the Court must have taken the view that such a change could not fairly be made unless the rates to the Texas ports were higher than they should be as compared with the rates to the Southeast as measured by the transportation standard, such as relative net return.

If that were, as it should be, the view of the Court, it overlooked the admission of the Commission on brief that the finding above quoted is not to be read as meaning that the rates to the Southeast are relatively lower than to the Texas ports "so far as the net return which they brought to the carrier was concerned." (Br. 21) This concession is the equivalent of saying that the report contains no finding which would be sufficient to provide rational support for an order approving a change in the line-haul rate factors when considered independently and solely from the standpoint of relative levels. It must, therefore, follow that the same inadequate finding will not support the approved change in total charges brought about by the remission of the loading charge to the Texas ports.

The significance of the admission just mentioned, which makes meaningless a finding which the Court treated as of consequence, is emphasized by the lack of any actual evidence as to relative rate levels. (See pages 33 to 35 of appellant's principal brief, with many cases cited.)

While the Commission is experienced and expert in rate regulations so that its judgment should not be disturbed other than for impelling reasons of law, it is not too much to ask that the rationale of every decision be disclosed by the report. In this case, the items in the report do not add up to the ultimate conclusion expressed. Administrative processes are strengthened, not weakened, when this Court insists on rational and sufficient findings. Human mistakes are more likely avoided when a report of the administrative body proceeds along the path of reason from a stated premise to a final conclusion. Such an insistence is not an unwarranted interference with the administrative body, although it does constitute a restraint thereon which is essential to the proper administration of justice for which this Court stands.

## THE DECISION UNDER SECTION 2

As appellant reads the majority opinion, it holds: (1) that a mere difference in destinations to which the traffic may be shipped after loading is in itself not sufficient to make Section 2 wholly inapplicable to the case, as a matter of law; (2) that it is within the Commission's administrative discretion to find that a difference in separately stated loading charges is not unjustly discriminatory under Section 2 if (subject to the requirement of support from the evidence), it finds that there are differences with respect to the line-haul which rationally might excuse such a difference in charges; and (3) that among the line-haul conditions which may rationally excuse such a difference under Section 2 are (a) differences in competitive conditions and (b) differences in the relative levels of the respective line-haul rates.

Appellant respectfully submits that rehearing should be accorded in respect to the foregoing holdings for reasons to be stated below. In presenting such reasons, appellant limits this petition to matters which apparently escaped the attention of this Court in arriving at its decision and to matters covered by the decision which appellant did not anticipate in brief and argument.

1. The foregoing holdings evidence a drastic departure from the traditional attitude of both the Commission and this Court toward Section 2 as to the character and scope of the discretion exercised in its administration.

Since the beginning of regulation, the touchstone of illegality under Section 2 has been the identity of the services involved. While discretion has extended to all questions of fact involved in the determination of identity, yet the conditions and circumstances to be examined have been treated as controlled by the words of the statute. In every case prior to this in which there has

been an unquestioned identity of physical services to which the differing charges in issue applied, the prohibition of Section 2 has been considered as applicable forthwith. All questions of equity, public interest, expediency, self interest, competition, actual damage, etc., have been wholly subordinated to the plain mandate of the statute which compels an absolute equality of charges for identical services, regardless of all else. In this respect Section 2 has been construed and applied very much as Section 6, insofar as the latter compels the collection of rates exactly as published, regardless of what might seem fair or appropriate from the standpoint of general considerations in a particular case.

This view of Section 2 precisely reflects the construction accorded by the English courts to the Equality Clause on which Section 2 is modeled, *Phipps v. N. & W. R. Co.*, 2 Q. B. 229, 249, and has been accepted without question by the Commission. *R. R. Commission of Geo. v. Clyde Steamship Co.*, 5 I. C. C. 324, 374-75 (4 I. C. R. 120.) In every case in which orders under Section 2 have been sustained, the report of the Commission discloses the exercise of discretion only within the narrow limits of the statute and the refusal of the Commission even to consider as relevant other circumstances unrelated to the physical service has been repeatedly approved. When discretion has not been exercised within the limits fixed by statute, the order has been set aside. *Interstate Commerce Commission v. B. & O. R. Co.*, 145 U. S. 263.<sup>2</sup>

In the case of Section 1, dealing with reasonableness, and of Section 3, dealing with undue preference and prejudice, the task of regulation is of infinitely greater complexity. The measure and relation of rates as con-

<sup>2</sup> Mistakenly cited at page 6 of the opinion of the majority as a case in which this Court sustained a Section 2 order.

trolled by those sections necessarily involves intricate relationships varying as to almost every factor relevant thereto. Consequently, Congress was purposely indefinite in its stipulations, and this Court has properly acknowledged the finality of the Commission's determination as to all factual questions, including the question of what conditions and circumstances should be treated as relevant.

In the case of Section 2, we have a different situation, not only with respect to the precision found in the terms of the statute but also as to the need for the exercise of discretion by the Commission in order to function as Congress intended. While broad discretion is required properly to proportion different rates to different services, little is needed merely to condemn unequal charges for identical services.

We respectfully submit that the Court has fallen into error by reason of its failure to distinguish between cases arising under Section 2 and cases arising under other sections of the Act as to the character and extent of the administrative discretion which Congress intended the Commission to exercise.

2. The Court has not had the benefit of oral argument from the parties on the question decided. On brief the Government and the Commission conceded that if the Commission based its conclusion under Section 2 on the fact that there was a difference in motor-truck competition and in the levels of rates on the respective line-hauls, it was considering factors which it was not legally entitled to consider (Br. 12, 25), but contended that the mere difference in the respective line-haul services—that is, the difference in routes and destinations—was sufficient, as a matter of law, to take the case entirely out from under Section 2 (Br. 23, *et seq.*). As to Section 2, the oral argu-

ment was accordingly confined to that narrow question of whether the section applied at all. The majority opinion disposes of the case on a different ground never before considered by the Court. Under such circumstances, appellant earnestly requests rehearing so that the Court may have the benefit of oral argument.<sup>2</sup>

3. The holding in the majority opinion that it is within the discretion of the Commission to consider differences in the matter of competition in a Section 2 case, is directly opposed to the universally accepted rule that such a difference may not be considered, this exclusion resting on a rule of law, rather than being treated as a matter of discretion. *Wight v. United States*, 167 U.S. 512, 518; *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U.S. 144, 166; *Seaboard Air-Line Railway Co. v. United States*, 254 U.S. 57, 62; Locklin, "Economies of Transportation," pp. 492-94. No rule is more firmly imbedded in the law which the Commission administers, and it has been repeatedly recognized in many cases,<sup>3</sup> including cases involving separately stated terminal charges and services.<sup>4</sup> Neither the Government nor the Commission asked, or even suggested, that the Court should overrule these prior cases.

None of the cases cited in the majority opinion holds to the contrary of those just cited. In *Manufacturers Ry.*

<sup>2</sup>In *Texas & Pacific Ry. v. United States*, 289 U.S. 627, this Court held that Section 3(1), as it then stood, could not be read as including a port within the term "locality." That point was not briefed or considered by the parties when the case was first argued. Accordingly, this Court, before deciding the case, directed that it be reargued with particular reference to the point stated.

<sup>3</sup>Many of such cases are collected in "Interstate Commerce Act Annotated," Vol. 2, p. 1093 n. 105.

<sup>4</sup>*Drayage Absorptions by S. W. M. R. R. Co.* (1926), 113 I.C.C. 179, 185; *Absorption of Loading Charge* (1930), 161 I.C.C. 389, 391-2; *Allowance for Driving Horses at Miles City, Mont.* (1938), 227 I.C.C. 387, 389.

*Co. v. United States*, 246 U.S. 457, this Court approved the refusal of the Commission to enter an order under Section 2 which was founded on a difference in circumstances and conditions directly incident to the switching services involved and not on a difference in the matter of competition, this Court saying (p. 482):

"In the present case the negative finding of the Commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal."

In *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344, neither the Commission nor this Court sought to say that a difference in competitive conditions, if found to exist, would have excused the discrimination there found. Rather, the order of the Commission approved by this Court was squarely pitched on a finding that the physical services involved were similar, the only point of controversy. In *Board of Trade of Kansas City v. United States*, 314 U.S. 534, the issue was as to differences in aggregate line-haul charges assessed under transit arrangements. The transit services were rendered at different locations so as to make unlike the services for which the line-haul rates were paid, and neither the Commission nor this Court held that a difference in competitive conditions, if proven, would excuse what otherwise would be discriminatory under Section 2.

In *Texas & Pacific Ry. v. United States*, 289 U.S. 627, the other case cited, there was no issue under Section 2. Rather, the issue was under Section 3(1) where the rule as to the legal relevancy of competition is different, as this Court took pains to point out in *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U.S. 144. The citation of the *Texas & Pacific* case suggests that the Court has fallen to the common error of confusing "unjust

discrimination" under Section 2 with "undue preference" under Section 3, the term "discrimination" being loosely used as if applicable to either case.<sup>5</sup>

Parenthetically, the order of the Commission approved by this Court in the *Seaboard Air-Line Ry.* case, *supra*, was deliberately pitched on Section 2, rather than on Section 3(1), because the unquestioned difference in competitive conditions constituted a factual defense under the latter section, although it was necessarily rejected, as a matter of law, as a defense under Section 2.

While the holding in the instant case is in conflict with the rule announced in the prior cases on which we rely, we cannot attribute to the Court an intention to overrule such cases. No party to the case requested the Court to take such action. Surely, if the Court so intended, it would not have been adverse to a clear statement to that effect. Consequently, the opinion as rendered can only result in confusion and dispute as to what is the correct rule, and uncertainty will be introduced in the Commission's administration of Section 2.

4. The majority apparently believes that Section 2 is of small consequence in a case such as this because the injury to the shipper, if any, is reflected in the total

<sup>5</sup> Sec. 2, *Interstate Commerce Acts Annotated*, editorial comment at page 1106; Locklin, "Economics of Transportation," p. 495 n. 1; Sharfman, "Interstate Commerce Commission," Vol. III-B, p. 421, n. 194. However, the English courts and text writers have been exceedingly careful in keeping distinct the meaning, application, scope, and method of enforcing the sections in the English statutes on which Sections 2 and 3(1) are respectively modeled. Leslie, "Law of Transport by Railway", 2nd ed., p. 591. *Phipps v. N. & W. R. Co.*, 2 Q. B. 229, 249. Even today, the Equality Clause in the English statute is enforceable only by the courts, the administrative tribunal having no jurisdiction thereover, and the clause does not apply unless the facts as to similarity of physical services fit the case. *Independent Newspapers Ltd. v. G. N. Ry. Co.* (1913), 2 Ir. R. 255, 264.

charges paid, and because any injury resulting from the aggregate charges can be redressed in a Section 3(1) case which puts the total charges, including the line-haul rates, in issue.

In suggesting that such a view rests on a misconstruction of the statute, we urge without elaboration the views expressed in the dissenting opinion of Mr. Justice Douglas. Going beyond that, we respectfully suggest that the majority has overlooked the distinctive position which Section 2 occupies in the Commission's administrative processes. Sharfman, in "Interstate Commerce Commission," Vol. III-B, at page 395, states:

"On the whole, conditions precedent or subsequent to the actual movement of traffic by rail—considerations of origin, destination, and use which do not affect the transportation task itself—are likely, if given weight, to provide an entering wedge for that pernicious sort of favoritism which it was a leading purpose of the Act to prevent. By standing staunchly for strict equality of treatment of like traffic under like conditions of carriage, the Commission contributed effectively to the attainment of this elementary objective of railroad regulation."

While, in many cases an unjustly discriminatory charge is equally an unduly prejudicial charge, nevertheless, Congress enacted these two sections and they should each be given the force and effect which Congress intended. Furthermore, in certain situations, which are particularly important here, relief can be secured under Section 2, although it might be difficult, if not impossible, to make out a case under Section 3(1). First, it is not necessary for a shipper to be in competition with another shipper in order to obtain relief under Section 2.<sup>6</sup> However, such a competitive relation is essential under Sec-

<sup>6</sup> Sharfman, "Interstate Commerce Commission," Vol. III-B, p. 378, n. 104.

tion 3(1).<sup>7</sup> When the appellant ships to the Southeast, his competition with merchants shipping to the Texas ports relates only to the buying of cotton. There is no direct competitive relation in the actual shipment and sale of the cotton since it goes, in one case, to the domestic mills, and in the other case, beyond the ports for water movement to other consumers. Consequently, it is arguable that if appellant is not entitled to the equality of loading charges guaranteed him by Section 2, he will be unable to meet with the condition precedent as to competition necessary to relief under Section 3(1), even if the proof is otherwise adequate.

In the second place, carrier competition is a factual defense under Section 3(1) and not under Section 2, so that undue discrimination can be established in cases where the carriers have a defense against a charge of undue prejudice.

In the third place, in a proceeding involving the relation of the *total* charges, appellant would be foreclosed from relief because differences in the physical circumstances and conditions incident to the through carriage would automatically make Section 2 inapplicable, as a matter of law, and appellant would be foreclosed from relief under Section 3(1) because of a lack of common control by the same carrier or carriers of the aggregate charges. *Texas & Pacific Ry. v. United States, supra.*

Under these circumstances, appellant is entitled to rely on Section 2 as applied to the difference in loading charges considered independently of the line-haul rates, and the Court should be reluctant to give that section a construction which will withhold from appellant the right to equal terminal charges which Congress intended to confer. The fact that the circumstances and conditions

<sup>7</sup> *Ibid.*, p. 559, n. 422; p. 529, n. 367.

which are relevant under Section 3(1) may, or may not, be such as to foreclose relief to the appellant thereunder, affords no logical reason for a failure to apply Section 2 according to its terms.

5. The majority opinion misconceives and misapplies the authorities in holding, that it is within the discretion of the Commission in a Section 2 case to consider or not, as it finds appropriate, the measure or the relation of the line-haul rates as a component part of the through charges, the aggregate of which is in part determined by the terminal charge which alone is in issue.

In the first place, this Court has overlooked the rule clearly stated in *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 253-4, buttressed by a long line of English cases construing the Equality Clause in the English Act on which our Section 2 is modeled, to the effect that Section 2—

“did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated.”

as well as the guiding principle stated in *Interstate Commerce Commission v. B. & O. R. R. Co.*, 225 U. S. 326, 342—

“Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences.”

In the latter case, this Court approved a refusal of the Commission to consider differences in the aggregate services which resulted from the fact that railway fuel moves as carrier freight beyond the destination to which consigned, while commercial fuel does not. That refusal was predicated on a concept of legal relevancy and not on administrative discretion.

In the second place, the Court has overlooked the sig-

nificance and effect of *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 105, 109, where this Court held that a terminal carrier is entitled to have the lawfulness of a separately stated terminal charge maintained by it determined independently of, and without merger with, line-haul charges maintained by other carriers. If such a separate carrier has an independent right to adjust its separate charge solely in the light of services rendered by it, consistency requires that it accept the obligation to treat all shippers equally in respect to that charge as maintained and applied independently of the line-haul rate, the latter being controlled by other carriers.

In the third place, the Commission cases cited on pages 5 and 6 of the majority opinion are not analogous to the instant case so as to support the rule stated.\* Except for the *Archer-Daniels-Midland Co.* case, these cases all involved a claim of discrimination predicated on a difference in the absorption<sup>9</sup> practices of a line-haul carrier. Those cases are distinguished on pages 7 to 10 of appellants' reply brief. To restate briefly: a complaint under Section 2 directed at a difference in absorption

\* *Archer-Daniels-Midland Co. v. Alton R. Co.*, 246 I. C. C. 421, 428, 430; *Minneapolis Traffic Ass'n v. Chicago & N. W. Ry. Co.*, 241 I. C. C. 267, 220, 224; *Railroad Comm. of Wisconsin v. Ann Arbor R. Co.*, 177 I. C. C. 588, 592; *State Docks Commission v. Louisville & N. R. Co.*, 467 I. C. C. 112, 115-6; *Tide Water Oil Co. v. Director General*, 62 I. C. C. 226, 227; *Richmond Chamber of Commerce v. Seaboard Air Line Ry.*, 44 I. C. C. 455, 466.

<sup>9</sup> In rate making, "absorption" is commonly used to denote the payment by one carrier of the charges of another carrier, the latter acting as the agent of the former. When used in the technical sense just stated, the term cannot be applied to the inclusion by a carrier of accessorial services under the line-haul rate maintained by the same carrier. Under the Commission's accounting regulations, absorptions are charged as deductions from revenue, while the cost of all services performed by a carrier which are included by it under rates maintained by it are charged to the appropriate operating expense primary accounts. 49 CFR 10.101.

practices is directed solely at the line-haul carrier and at the differences in the services which the latter includes within the line-haul rates maintained by it. The line-haul rate is constant, regardless of the absorption. If there is no absorption, a separate switching carrier collects its charge from the shipper. Where the charge is absorbed, the switching carrier is paid by the line-haul carrier which employs the switching line as its agent. Consequently, a Section 2 case involving switching absorptions goes to a quantity of the service under a particular line-haul rate, rather than to a difference in rates collected by the carrier complained of. Section 2 requires a consideration of the line-haul conditions because the complaint is actually directed to the line-haul rate. The Commission properly holds, as a matter of law, that Section 2 does not apply in such a case unless the total services are identical. However, the application of Section 2 in such a case is not considered to involve any administrative discretion, other than in determining whether or not the line-haul conditions are similar. Once that is determined, Section 2 applies or does not apply as a matter of law.

In the *Archer-Daniels-Midland Co.* case, the carriers charged 66 cents for installing a grain door but made no charge for furnishing a grain door in connection with services between terminals. Contemporaneously, they charged \$2.48 for *furnishing* and installing a grain door in a cross-town switching movement in a single terminal. The Commission held this did not result in a violation of Section 2 because of dissimilar circumstances and conditions, the line-haul rates contemplating the *furnishing* of the doors, although not their installation, while the cross-town switching rates did not cover the furnishing of the grain doors. That case would be like this one if the difference in charges had related to the installation service prior to the haul of the traffic. That, how-

ever, was not the difference at which the complaint was directed. The difference in issue was actually inherent in the extent of the services *between origin and destination* included within the rate for haulage, the doors being included in one case and not in the other. Since the services directly involved were an integral part of the haulage services, regardless of the charge therefor, the admitted difference in the whole of the haulage services took that case from under Section 2 as a matter of law.

In the fourth place, the majority has misunderstood and misapplied the Commission cases cited in footnote 5 on page 8 of the majority opinion.<sup>10</sup> The error in which the majority has fallen is due in part to some looseness of expression on the part of the Commission, in part to the failure of the Court to note that the Commission has overruled certain of the cases cited, and in part to an admitted lack of consistency in the Commission's own decisions. (See Charles W. Berry, "Study of Proportional Rates," 10 I. C. C. Prac. Journal, March, 1943, pp. 545-607.)

The generally accepted rule in cases dealing with the lawfulness of proportional rates, under every section of the Act, was announced in *Cairo Board of Trade v. C., C. & St. L. Ry. Co.* (1917), 46 I. C. C. 343, 350-1, which overruled the *Stevens Grocer Co.* case, the latter being

<sup>10</sup> *Stevens Grocer Co. v. St. Louis, I. M. & S. Ry.*, 42 I. C. C. 396, 397-8; *Cairo Association of Commerce v. Angelina & N. R. R. Co.*, 160 I. C. C. 604, 608-9; *Switching at Minneapolis*, 235 I. C. C. 405, 410; *Cairo Board of Trade v. Cleveland C. C. & St. L. Ry.*, 46 I. C. C. 343, 350-1; *Indianapolis Chamber of Commerce v. Cleveland, C. C. & St. L. Ry.*, 46 I. C. C. 547, 556; *Phoenix Utility Co. v. Southern Ry.*, 173 I. C. C. 500, 501-2 and cases cited; *Nebraska-Colorado Grain Producers Assn. v. C. B. & Q. R. Co.*, 243 I. C. C. 309, 311-13; *Fraser-Smith Co. v. Grand Trunk W. Ry.*, 185 I. C. C. 57, 62; *Atkinson-Milling Co. v. Chicago, M., St. P. & P. R. Co.*, 235 I. C. C. 391, 393-4; *Livestock to Eastern Destinations*, 156 I. C. C. 498, 509.

cited and relied upon by the majority of this Court. In the *Cairo* case an undivided Commission, speaking through Commissioner Meyer, said:

"The rule is stated in the *Stevens Grocer Co. Case* more broadly than it should be. In determining whether or not a complainant has been damaged [so as to be entitled to reparation] by the exaction of unreasonable or unduly preferential reshipping rates the total through charges paid from point of origin must be considered. But this does not hold true of a determination of the reasonableness or justness of the reshipping rate itself. \* \* \* An excessive reshipping rate might produce a reasonable through charge in connection with an unduly low inbound rate and vice versa. It can not properly be argued that a proposal to increase unremunerative reshipping rates could be denied upon the ground that the through charge composed of an excessive inbound rate and the unremunerative reshipping rate is just and reasonable. The converse must also be true, namely, that shippers may not upon like grounds be denied relief from unreasonable or unduly prejudicial reshipping rates."

The rule of the *Cairo Board of Trade* case, which is analogous to the rule applicant seeks in this case, has been followed in a host of later cases, thirty-five of them being collected in an appendix to Mr. Berry's article.

There is a type of proportional rate case in which it is necessary to consider the aggregate charges. In such cases the proportional does not apply generally but is restricted to shipments from or to a particular point or territory of origin or destination, the measure of the particular charge being directly conditioned on the exact measure of the other components in the through rate. These are found almost exclusively in the grain adjustment where they are used so as to produce equal through rates via various gateways or rate break points. These are called "varying proportionals," and constitute the type con-

sidered by the Commission in *Fraser-Smith Co. v. Grand Trunk W. Ry.*, *supra*, and *Atkinson Milling Co. v. Chicago, M. St. P. & P. R. Co.*, *supra*. The Commission treated *Nebraska-Colorado Grain Producers Assn. v. C. B. & Q. R. Co.*, *supra*, as involving the same type of rates, since the factors there involved were directly related to the other components making up through rates on grain under the rate-break principle. The reason for considering the through rate in a case of varying proportionals was clearly explained in *Central Pennsylvania Coal Producers Association v. B. & O. R. Co.*, 196 I. C. C. 203, 235. However, when the separately stated charge is a component of the through rate by the happenstance of application to a through shipment, rather than because made interdependent with other components, the accepted rule is stated in the *Cairo Board of Trade* case, *supra*.

In the same footnote, the majority mistakenly cite *Livestock to Eastern Destinations*, 156 I.C.C. 498, 509, as holding, in an investigation and suspension proceeding under Section 15(7), that the Commission deems it proper to consider the effect of the proposed rate factor on the through-rate structure. As we read the case, what the Commission really did was to mention contentions predicated on a consideration of the through rates, at the same time rejecting them as a relevant circumstance in the case before it involving only a single component. In that case, a change in a western rate factor was protested on the ground that it would increase the through rates to the East, the protestants asserting the right to reasonable through rates not in excess of those presently in effect. As to that the Commission held (pp. 504-5):

... \* \* \* This is an investigation and suspension proceeding and its scope is necessarily limited by the schedules under suspension. Although named in some of the tariffs containing these schedules, the carriers

which serve points in central, trunk-line, and New England territories, with unimportant exceptions, are not parties to the suspended schedules. The suspension of the operation of these schedules did not raise any issue which those carriers were called upon to meet, and the question of joint rates to points on the lines of those carriers is not properly before us. As between that and the question of the reasonableness and propriety of the proposed proportional rates, we are limited in this proceeding to consideration of the latter."

If the same rule of law had been applied here, appellant would have prevailed before the Commission.

The Commission also held in the case cited (p. 509) that its action must be restricted to the rates before it and that it was not empowered to require western carriers to make an adjustment of rate factors, separately maintained and controlled by them, so as to provide some particular relation with other rates or rate factors not in issue.

WHEREFORE, appellant respectfully prays a rehearing of the decision of this Court of May 3, 1943, so that the decree of the District Court may be reversed and the case remanded to that court with directions to enter the injunction prayed for.

Respectfully submitted,

LUTHER M. WALTER  
JOHN S. BURCHMORE,  
NUEL D. BELNAP,

*Attorneys for Appellant.*

I, NUEL D. BELNAP, counsel for appellant, certify the foregoing petition is presented in good faith, is true and correct, and is not filed for delay.

NUEL D. BELNAP.

May, 1943.

# SUPREME COURT OF THE UNITED STATES.

No. 520.—OCTOBER TERM, 1942.

L. T. Barringer and Company, Appellant, vs. The United States of America, Inter- state Commerce Commission, At- chison, Topeka and Santa Fe Rail- way Company, et al.	}	Appeal from the District Court of the United States for the Western District of Tennessee.
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[May 3, 1943.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a suit by appellant, a shipper of cotton over the lines of appellee railroads, brought under 28 U. S. C. § 41(28), to enjoin and set aside an order of the Interstate Commerce Commission. The District Court of three judges dismissed the complaint, and the case comes here on direct appeal pursuant to 28 U. S. C. § 47. The question is whether the Commission erred in refusing to set aside tariffs on cotton, filed by the five appellee railroads, as unjustly discriminatory and unduly prejudicial to shippers in violation of §§ 2 and 3(1) of the Interstate Commerce Act, 24 Stat. 379, 380; 49 U. S. C. §§ 2, 3(1).

From the report of the Commission, on which its order was based, 248 I. C. C. 643, the following facts appear. Appellees carry cotton from points in Oklahoma to ports on the Gulf of Mexico. Their lines also form relatively short parts of the through routes over which cotton moves from Oklahoma to points in the southeastern United States. During recent years carriers of cotton to the Gulf ports have been faced with serious truck competition. To meet it, successive rate reductions have been made. Until about ten years ago the only rates available on cotton were less-than-carload rates, since individual shipments of cotton are seldom, if ever, in carload quantities. As is customary on less-than-carload shipments, the cotton was loaded at the expense of the carrier.<sup>1</sup>

<sup>1</sup>Loading is customarily performed at the carrier's expense on less-than-carload freight. Loading Cotton in Oklahoma, 248 I. C. C. 643, 644, and at the shipper's expense on carload freight, Merchants' Warehouse Co. v. United

During 1932 and 1933 the carriers, in an effort to reduce rates and achieve operating economies, put in effect so-called carload rates for cotton which the Commission, after investigation, approved in *Cotton From and to Points in Southwest and Memphis*, 208 I. C. C. 677. Under these rates the cotton was typically collected in less-than-carload quantities at the ginning points, carried by rail for short distances to compressors, and after compression assembled in carload quantities for shipment to destination. The shipper paid the local, less-than-carload rate to the compress point, and the local rate from compress point to destination, but on the cotton's arrival at destination the carrier refunded the difference between the freight paid and the through, carload, rate from point of origin to destination. On these rates loading was at the shipper's expense; if the carrier performed the loading service a charge of 5½ cents a square bale was made, which was paid by a deduction from the refund allowed by the carrier on the transit settlement just referred to. This loading charge was stated separately in appellees' tariffs filed with the Commission, pursuant to § 6(1).

Despite the reduction in cost to shippers produced by the adoption of these schedules, truck competition continued to be a serious problem. In 1939 carriers of cotton from Texas points effected a farther rate reduction by eliminating the loading charge. The tariffs here under consideration, filed by appellees to be effective on June 11, 1941, similarly eliminate the loading charge for cotton moving from compress points in Oklahoma to certain ports on the Gulf of Mexico,<sup>2</sup> while retaining it on cotton moving to the Southeast.

Appellant buys cotton in Oklahoma for resale to mills in the Southeast. Under the proposed tariffs it must continue to pay the loading charge on cotton which it ships to the Southeast, while merchants who ship to the Gulf ports, and who compete with appellant in the purchase of cotton, are relieved of that charge. Contending that this situation would create an unjust discrimination under § 2, and would be unduly prejudicial under § 3(1),

States, 223 U. S. 501, 506; *Pennsylvania R. Co. v. Kittaning*, 253 U. S. 319, 323; *Loading and Unloading Car-Load Freight*, 101 I. C. C. 394, 396; *McCormick Warehouse Co. v. Pennsylvania R. Co.*, 148 I. C. C. 299, 300.

For discussions of loading practices on cotton in the Southwest see *Cotton Loading Provisions in the Southwest*, 220 I. C. C. 702; *Cotton Loading and Unloading in the Southwest*, 229 I. C. C. 649.

<sup>2</sup> Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur, and Texas City, Texas, and Lake Charles, Louisiana.

appellant filed a petition with the Commission under § 15(7) to suspend the proposed tariffs.

Division 3 of the Commission, after a hearing in which appellant participated, issued its report and order, refusing to set aside the proposed rates. It found, that truck competition had continued to increase during 1940, so as to justify appropriate efforts by the carriers to meet such competition; that the loading charge caused annoyance to shippers; that the cost of performing the loading service was in most cases nominal and its performance by the carrier would result in loading to maximum capacity, so that elimination of the charge was a suitable method of achieving a needed reduction in rates which were already low; that carriers in states further East opposed the extension into their territory of the practice of free loading, and the elimination by appellees of the loading charge on cotton moving into that territory; that the "rates to the Southeast are already lower relatively than they are to the Texas ports"; and that "there is no trucking of cotton from Oklahoma to the Southeast." Accordingly it found that the proposed elimination of the loading charge "is just and reasonable and not shown to be otherwise unlawful." Appellant's petition for reconsideration was denied by the full Commission, and the proposed rates, which had been suspended while under consideration by the Commission, became effective.

Appellant's principal contention is that in considering the validity of the proposed tariffs under § 2, the Commission could look only at the charge for the loading service and was not entitled to consider conditions relating to the through line-haul rates. Section 2 of the Act declares it to be an "unjust" and prohibited discrimination for any carrier "directly or indirectly, by any special rate, rebate . . . drawback or other device", to charge one person more or less than another for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." It is undoubted that the loading service here involved is a transportation service to which § 2 applies. § 1(3)(a); *Merchants Warehouse Co. v. United States*, 283 U. S. 501, 511.

Section 2 is aimed at the prevention of favoritism among shippers. See Sharfman, *Interstate Commerce Commission*, vol. III-B, pp. 360-61. Where the transportation services are rendered under

<sup>3</sup> The Commission pointed out that carriers were free to adopt free loading or not as they chose, and in the same proceeding approved an application of certain Texas carriers to reestablish the loading charge.

substantially similar conditions the section has been thought to prohibit any differentiation between shippers on the basis of their identity. *Interstate Commerce Commission v. Baltimore & Ohio R.*, 225 U. S. 326, 342; *Interstate Commerce Commission v. Delaware L. & W. R. R.*, 220 U. S. 235, 252, or on the basis of competitive conditions which may induce a carrier to offer a reduction in rate to one shipper while denying it to another similarly situated, *Wight v. United States*, 167 U. S. 512, 516-18; *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S. 144, 166. Compare *Seaboard Air Line Ry. v. United States*, 254 U. S. 57, 62. But differences in rates as between shippers are prohibited only where the "circumstances and conditions" attending the transportation service are "substantially similar". Whether those circumstances and conditions are sufficiently dissimilar to justify a difference in rates, or whether, on the other hand, the difference in rates constitutes an unjust discrimination because based primarily on considerations relating to the identity or competitive position of the particular shipper rather than to circumstances attending the transportation service, is a question of fact for the Commission's determination. Hence its conclusion that in view of all the relevant facts and circumstances a rate or practice either is or is not unjustly discriminatory within the meaning of § 2 of the Act will not be disturbed here unless we can say that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construction of the statute. *Seaboard Air Line Ry. v. United States*, *supra*, 62; *Interstate Commerce Commission v. Delaware L. & W. R. R.*, *supra*, 251-2; *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 758; *Merchants Warehouse Co. v. United States*, *supra*, 508; *Baltimore & Ohio R. Co. v. United States*, 305 U. S. 507, 524.

In considering the circumstances and conditions attending the transportation service the Commission was not required to ignore the fact that the loading charges, although separately stated in the tariffs, are in each case a component part of the total line-haul cost to the shipper and inseparable from it. All the carrier loading costs not compensated for by the loading charges, if any, to shippers, are necessarily absorbed by the carrier out of the line-haul charges which shippers pay. The loading charge is not paid until the line-haul is completed and the ultimate destination known, and then only by a reduction of the refund payable by the carrier on the transit settlement prescribed by the tariffs. And where cotton

moves on less-than-carload rates the cost of loading is absorbed by the carrier, although the loading services performed by the carrier are the same. In these circumstances the net effect, on the shipper's line-haul cost, of the remission by the tariff of any part of the loading charge, is precisely the same as though the like reduction were made in the line-haul tariff.

It has long been established by our decisions that differences in competitive conditions may justify a relatively lower line-haul charge over one line than another, and that it is for the Commission, not the courts, to say whether those differences are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful. *Texas & Pacific Ry. v. United States*, 289 U. S. 627, 636-7, and cases cited; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 481; *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344, 352-53; *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 546. It follows that competitive conditions which would justify and render non-discriminatory a reduction in the line-haul tariff on a particular class of traffic, would likewise justify the reduction and render it non-discriminatory if made in the loading charge instead. Whether made in the one charge or the other, it enters into the total cost of the line haul to the shipper, regardless of whether the loading charge be separately stated or included in the line-haul tariff. Since the only effect on the shipper is in the difference in the line-haul charge and he is harmed no more by one method of effecting that difference than the other, any conditions attending the line haul which justify the one as non-discriminatory equally justify the other. *that*

This Court has held the Commission may consider the through line-haul rate in determining whether a related accessorial charge is just and reasonable under § 1 (5) (a). *Atchison, T. & S. F. Ry. v. United States*, 232 U. S. 199, 219-220. We find nothing in § 2 or in our decisions that precludes the Commission from similarly looking at the whole of the services rendered to different shippers to determine whether the conditions are such as to justify a difference in charges made for one component part of that whole. Nor has the Commission found such a limitation in the statute. *Archer-Daniels-Midland Co. v. Alton R. Co.*, 246 I. C. C. 421, 428, 430; *Minneapolis Traffic Ass'n v. Chicago & N. W. R. Co.*, 241 I. C. C. 207, 220, 224; *Railroad Comm. of Wisconsin v. Ann Arbor R. Co.*, 177 I. C. C. 588, 592; *State Docks Commission v. Louisville & N. R. Co.*, 167 I. C. C. 112, 115-116; *Tide Water Oil Co. v.*

*Director-General*, 62 I. C. C. 226, 227; *Richmond Chamber of Commerce v. Seaboard Air Line Ry.*, 44 I. C. C. 455, 466.\*

Obviously there is nothing in this construction of § 2 which would preclude the Commission from setting aside a difference in a separately stated service charge which in fact operates to discriminate unjustly among shippers. We have repeatedly sustained a finding of the Commission that such a difference, based on a difference in identity of shippers or the ownership of the goods shipped, or on other circumstances irrelevant to the carrier service rendered, is an unjust discrimination to shippers. *Wight v. United States*, *supra*; *Interstate Commerce Commission v. Delaware, L. & W. R. R.*, *supra*; *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, *supra*; *Seaboard Air Line Ry. Co. v. United States*, *supra*; *Louisville & W. R. Co. v. United States*, *supra*; *Merchants Warehouse Co. v. United States*, *supra*. The distinction between those cases and this is that here the difference in the service charge is made between through shippers over different routes, and is based on relevant differences in the "circumstances and conditions" of the total transportation services rendered by the carriers. It was within the competence of the Commission to find that this involved no unjust discrimination.

This is not to say that in every case where the differences in total transportation services rendered are such as would justify a greater charge to one than to another shipper, the difference in charge can at the carrier's option be made in the charge for an accessorial service such as the loading service here involved. But the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge, or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism. In the circumstances of this case we cannot set aside, as lacking in rational basis, the Commission's determination that the reduction in the line-haul cost to the shipper effected by remission of the loading charge did not result in an unjust discrimination.

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\* Insofar as *Birkett Mills v. Delaware, L. & W. R. Co.*, 123 I. C. C. 63, 65, is to the contrary, it appears to rest on a misinterpretation of the effect of our decision in *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, 255. Moreover it does not appear that there were present in that case any circumstances justifying a difference in the charges for the total transportation services rendered.

It is no answer to this determination of the Commission to say that the rates here approved as non-discriminatory may be open to attack in a proceeding under § 13(1) to adjust the line-haul rates in which all connecting carriers who participate in the tariff are required to be parties by Rule II(c) of the Commission's 1936 Rules of Practice, or in a proceeding under § 15(3) to establish divisions of the through rates among the connecting carriers, "a matter which in no way concerns the shipper", *Louisville, N. R. R. v. Sloss-Sheffield Co.*, 269 U. S. 217, 234. Here the difference in loading charge is assailed by a shipper only, and on the grounds alone that it is unjustly discriminatory or unduly preferential. The discrimination or preference, if any, is caused by the carriers who perform in part the line-haul transportation service. The Commission has not undertaken to pass upon the validity of the line-haul rates, and it does not appear that appellant has asked it to do so. It has passed only on the question of discrimination or preference resulting from the remission of the loading charge. In doing so it has, as § 2 contemplates, looked at all the relevant circumstances and conditions, including the respective line-haul conditions, in order to ascertain whether the loading service and line hauls are made under substantially similar circumstances and conditions with respect to the particular discrimination charged. The Commission has found that they are not and that the difference in service charge is not unjustly discriminatory as to shippers.

Section 2 gives us no mandate, and none is to be implied from the statutory scheme, to reverse that finding and to declare that the difference in service charge constitutes an unjust discrimination merely because the total through cost, of which that charge is a component, may be open to attack in a proceeding bringing the through rate into question. See *Manufacturers Ry. v. United States*, *supra*, 479, 481. But unless we are to say that § 2 precludes the Commission from considering facts which are relevant to the issue of discrimination which it must decide, we perceive no other ground upon which their consideration can be deemed forbidden.<sup>5</sup> In the present proceeding the only question

<sup>5</sup> The Commission has not interpreted its Rule II(c) as precluding it from looking at relevant conditions and circumstances relating to the through rate although only part of that rate is brought in issue in the proceeding before it and other carriers participating in the through rate have not been joined as parties. Where the attack is on a component part of the through haul cost on grounds other than its effect on the through rate structure, there is no occasion for joining the other carriers participating in the through rate.

in issue is whether the proposed elimination of the loading charge is unjustly discriminatory or unduly prejudicial; nothing in the Commission's order or its Rules of Procedure forecloses attack on the line-haul rates in an appropriate proceeding on any ground which the statute authorizes.

Nor do we find anything in § 6(1) which precludes the Commission from looking ~~at~~ the entire through rate. That section merely requires carriers to file with the Commission all rates and charges established by them, and to "state separately all terminal charges, storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed." Appellees have complied with its requirement that the loading charge, and the exceptions to it created by the

The Commission has frequently held that a complainant who attacks a component part of a through rate as unreasonable or prejudicial because of its effect on the through rate structure, must join all carriers participating in the through rate. *Stevens Grocer Co. v. St. Louis, E. M. & S. Ry.*, 42 I. C. C. 396, 397-8; *cf. Cairo Association of Commerce v. Angelina & N. R. R. Co.*, 160 I. C. C. 604, 608-9; *Switching at Minneapolis*, 235 I. C. C. 405, 410. But it has also held that a shipper who attacks the validity of a component part of a through rate, viewed separately, and does not put in issue the validity of the through rate as a whole, may do so without joining any carrier other than the one responsible for the particular component under attack. *Cairo Board of Trade v. Cleveland C. C. & St. L. Ry.*, 46 I. C. C. 343, 350-51; *Indianapolis Chamber of Commerce v. Cleveland C. C. & St. L. Ry.*, 46 I. C. C. 546, 556; *Phoenix Utility Co. v. Southern Ry.*, 173 I. C. C. 500, 501-2; and cases cited; see *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768, 776-7. In the latter type of case, where the complaint puts in issue only the validity of one part of a through rate, the Commission has held that the carrier is not precluded from introducing evidence to show that the rate attacked should not be set aside as unlawful, in view of its relationship to the whole through rate. *Nebraska Colorado Grain Producers Ass'n. v. C. B. & Q. R. R.*, 243 I. C. C. 309, 311-13; *Fraser-Smith Co. v. Grand Trunk W. Ry.*, 185 I. C. C. 57, 62; *Atkinson Milling Co. v. Chicago, M. & St. P. & P. Ry.*, 235 I. C. C. 391, 393-4.

*Nebraska Colorado Grain Producers Ass'n. v. C. B. & Q. R. R.*, *supra*, involved an attack on a component part of a through rate as unreasonable and preferential. In denying complainant's motions to exclude evidence introduced by the carrier relating to the through rate structure of which the rate under attack was a part, the Commission said: "The right to attack one factor of a combination through rate without putting the through rate in issue presents an entirely different question from that raised by these motions. While we have consistently held, in the cases referred to by complainant and supporting interveners, that where reparation is not claimed, one factor of a combination through rate may be assailed independently of the other factor or factors or even of the through rate itself, this does not mean that we may not look at the through situation." The Commission further pointed out that, "Although we have authority to find separate components of through rates unlawful, we must, in doing so, give careful consideration to the effect of such a finding on the through rates." 243 I. C. C. at 312, 313. Similarly in investigation and suspension proceedings under § 15(7), where necessarily the only rate in issue is that proposed and under suspension, the Commission has deemed it proper to consider the effect of the proposed rate on the through rate structure. *Livestock to Eastern Destinations*, 156 I. C. C. 494, 509.

present tariffs, be separately posted. We have not construed § 6(1), which is designed to insure publicity of rates, *Kansas City Southern Ry. Co. v. Albers*, 223 U. S. 573, 596-7, as precluding a carrier from performing an accessorial service free of charge provided no violation of any other section of the Act is shown. See *Interstate Commerce Comm. v. Stickney*, 215 U. S. 98, 105. Nor does it preclude the Commission from considering the validity of the imposition or elimination of such a separately-stated charge in the light of its relationship to the through rate. Compare *Atchison, Topeka, & Santa Fe v. United States*, *supra*.

What we have said of § 2 suffices also to dispose of the objection based on § 3(1). That section makes it unlawful to give an "undue or unreasonable preference or advantage" to, or impose an "undue or unreasonable prejudice or disadvantage" on, any "person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic." It differs from § 2 in that it may be availed of not only by shippers but by any other person who has been or may be injured by an inequality of rates.

But the facts which we hold sufficient to justify the Commission's finding that the elimination of the loading charge does not result in an unjust discrimination, are sufficient also to justify its finding that the elimination of that charge does not create an undue preference. Compare *Clover Splint Coal Co. v. Louisville & N. R. Co.*, 197 I. C. C. 276, 277. We have frequently sustained the Commission's determination, in cases arising under § 3, that differences in competitive conditions justify lower through rates over one route than over another. *Texas and Pacific Ry. v. United States*, *supra*; *Texas and Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 205-217; *Interstate Commerce Comm. v. Chicago G. W. Ry. Co.*, 209 U. S. 108, 119, 121-2.

We cannot say here, any more than under § 2, that the Commission could not regard the truck competition to the Southwest, and the relative rate structures disclosed in its report, as sufficient to warrant the difference in the cost of the through haul which results from the elimination of the loading charge by the present tariffs.

*Affirmed.*

# SUPREME COURT OF THE UNITED STATES.

No. 520.—OCTOBER TERM, 1942.

L. T. Barringer and Company, Appellant, vs. The United States of America, Inter- state Commerce Commission, At- chison, Topeka and Santa Fe Rail- way Company, et al.	}	Appeal from the District Court of the United States for the Western District of Tennessee.
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[May 3, 1943.]

Mr. Justice DOUGLAS, dissenting.

Sec. 2 of the Act makes it unlawful for any common carrier "by any special rate, rebate, drawback, or other device" to receive from any person "a greater or less compensation for any service rendered" in the "transportation" of passengers or property than it receives from any other person for doing for him "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Loading is clearly a "service rendered" in the "transportation" of property<sup>1</sup> within the meaning of § 2. See *Merchants Warehouse Co. v. United States*, 283 U. S. 501. The practice which is now held to be free from the charge of unlawful discrimination under § 2 is the practice of loading cotton free for certain shippers who ship to one destination and exacting a loading charge from others who ship from the same points, but to a different destination. That is to say, free loading of cotton is allowed shippers who ship cotton from Oklahoma to the Texas Gulf ports; a loading charge<sup>2</sup> is required from those who ship cotton from the identical places in Oklahoma to the Southeast.

The Commission in its report justified that discrimination on the following considerations: (1) there is no trucking of cot-

<sup>1</sup> Sec. 1(3)(a) defines "transportation" so as to include "all services in connection with the receipt, delivery . . . and handling of property transported."

<sup>2</sup> The loading charge is 3.5¢ per square bale of cotton and 2.75¢ per round bale. This loading rate is carried separately in the tariffs as is required by § 6(1) of the Act. See Tariff Circular 20 (I. C. C. 1933) Rule 10(a).

tion between points in Oklahoma and the Southeast while there is considerable truck competition in the movement of cotton from Oklahoma to the Texas Gulf ports; (2) carload rates on cotton from Oklahoma to the Southeast are on a relatively lower basis than carload rates from the same origins to the Texas Gulf ports; and (3) rates from points in Oklahoma both to the Southeast and to the Texas Gulf ports are depressed. The Commission in its report made no specific reference to § 2. It now seeks to sustain its order on the ground that the conditions surrounding the respective line-hauls justified the carriers in absorbing the loading charge in the line-haul rates for one shipper but not for another. It endeavors to avoid the issue of discrimination by contending that § 2 as a matter of law has no application to the present situation. Its argument is that § 2 does not apply where the line-hauls are not over the same line, for the same distance, and to the same destination. That contention is based on *Wight v. United States*, 167 U. S. 512, which the Commission claims to have followed consistently.<sup>3</sup>

I disagree with that construction of § 2. The *Wight* case involved a rebate by one road of a part of the rate between Cincinnati and Pittsburgh and was made on account of drayage at the Pittsburgh end. The Court held that § 2 was violated, saying that that section "prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor." 167 U. S. p. 518. It does not follow that § 2 applies ONLY where those identical conditions exist. Thus in *Birkett Mills v. Delaware, L. & W. R. Co.*, 123 I. C. C. 63, the Commission had before it a complaint of millers, grain dealers, and elevator companies in New York respecting different transit charges on ex-lake and all-rail traffic, the transit charges being separately established. It held that "as the differing transit charges are for the same transit services at the same points by the same carriers, unjust discrimination under section 2 of the act exists." p. 65. No reference was made to line-haul conditions, though the relation between transit priv-

<sup>3</sup> *Richmond Chamber of Commerce v. Seaboard Air Line Railway*, 44 I. C. C. 455, 464-466; *Pacific Lumber Co. v. N. W. P. R. Co.*, 51 I. C. C. 738, 760; *Tide Water Oil Co. v. Director General*, 62 I. C. C. 226, 227; *Standard Oil Co. v. Director General*, 87 I. C. C. 214; *Bunker Hill & Sullivan M. & C. Co. v. N. P. Ry. Co.*, 129 I. C. C. 242, 246; *Cane Sugar from Wisconsin to Minnesota*, 203 I. C. C. 373, 376; *Miller Waste Mills, Inc. v. Chicago, N., St. P. & P. R. Co.*, 226 I. C. C. 451, 453.

ileges and rate structures is intimate. *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768; *Board of Trade v. United States*, 314 U. S. 534. And the principles of the *Birkett Mills* case have been applied by the Commission to other situations where the haul was not over the same line, for the same distance, and to the same destination. *Suffern Grain Co. v. Illinois Central R. Co.*, 22 I. C. C. 178, 183-184; *Washington D. C. Store-Door Delivery*, 27 I. C. C. 347.

It was stated in *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U. S. 263, 284, that "any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge." Those inequalities of conditions may relate to the circumstances of carriage. But the fact that different rates for carriage are warranted does not necessarily mean that different rates for identical accessorial services in connection with the carriage are justified. The Court stated in *Merchants Warehouse Co. v. United States*, *supra*, p. 511, that "Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one, in connection with the delivery of freight at his place of business, which it denies to another in like situation." And see *Baltimore & Ohio R. Co. v. United States*, 305 U. S. 507, 524. By the same token there is a forbidden discrimination, in case of an accessorial service such as loading, where different rates are charged different shippers though the physical services rendered during the loading are alike.

But it is said in reply that there is nothing in § 2 which limits the phrase "under substantially similar circumstances and conditions" to the circumstances surrounding the particular accessorial service in question; and that it is a factual issue for the informed judgment of the Commission whether line-haul conditions are to be considered in determining the validity of separate charges for services such as loading. The answer, however, seems clear. The service of loading, like the transit service in the *Birkett Mills* case, is identical whether the property is going south or south-east, whether its journey is long or short, whether it is transported by one carrier or another. A carrier which is loading in Oklahoma one car of cotton for a southeastern mill, and another car of cotton for a Gulf port is certainly performing a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." A carrier which is loading two cars at the same time, on the same

siding, with the same commodity is indeed performing the same service under the same circumstances and conditions. To charge the first shipper for loading his car and to load the other one free would be to impair the rule of equality which § 2 was designed to inaugurate. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 226 U. S. 235; *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 749-750. The result in the present case is a gross discrimination against shippers to the Southeast.<sup>4</sup>

There may be cases of special charges for special services where the validity of the rate under § 2 is dependent on whether the line-haul conditions are the same.<sup>5</sup> Yet § 2, though primarily related to the line-haul, is not restricted to it. *Merchants Warehouse Co. v. United States*, *supra*. At least where the service in question is purely accessorial, § 2 is applicable though the line-hauls are not over the same line, for the same distance and to the same destination. Where § 2 is applicable, competitive factors (such as those on which the Commission relied) are no justification for the discrimination. *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 166; *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 225 U. S. 326, 342; *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57, 62; *Absorption of Loading Charge*, 161 I. C. C. 389, 391; *Allowance for Driving Horses*, 227 I. C. C. 387, 389. The justification under § 2 for "unequal rates must rest in the facts of carriage and not in the financial interests of the carrier." Sharfman, *The Interstate Commerce Commission*, Pt. 3, Vol. B, p. 371.

There are, of course, occasions when a consideration of the line-haul rate in relation to the charge for an accessorial service is proper. That is the case where a rate has been challenged under § 1(5)(a) as not being "just and reasonable". In that event it is wholly proper to determine whether elements of cost not provided in the separate rate are, in fact included, in the line-haul rate. *Atchison, T. & S. P. Ry. Co. v. United States*, 232 U. S. 199, 219-220; *Perishable Freight Investigation*, 56 I. C. C. 449, 461-465; *Alton & S. R. R. v. United States*, 49 F. 2d 414, 417-428. But the issues framed by § 1(5)(a) are larger than

<sup>4</sup> None of the carriers to the Southeast serves the Gulf ports. Appellee carriers have only a short part of the line-haul on cotton from Oklahoma to the Southeast.

<sup>5</sup> The Commission apparently has so treated the problem of absorption of switching charges. See *Tide Water Oil Co. v. Director General*, 62 I. C. C. 226; *Restriction of Kansas City Switching District*, 146 I. C. C. 438, 440. And see *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57. Cf. *United States v. American Tin Plate Co.*, 301 U. S. 402.

the more limited ones under § 2. And though the rate is just and reasonable under § 1, it may nevertheless create an unjust discrimination under § 2. *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U. S. 263, 277; *American Express Co. v. Caldwell*, 244 U. S. 617, 624; *United States v. Illinois Central R. Co.*, 263 U. S. 515, 524.

But it is said that the loading charge is a component part of the total line-haul charge; that competitive conditions would justify a reduction in the line-haul tariff; and that a shipper is affected no more by an increase or decrease in one than in the other. It is therefore argued that changes in the charge for this accessorial service may be treated the same as if the line-haul tariff were in issue. That argument, however, results in this: an adjustment in charges for accessorial services such as loading is utilized as an indirect method of adjusting line-haul rates. That is not permitted under this statutory system. Although charges for services such as loading are a part of the total line-haul charge, they must be separately stated in the tariffs. § 6(1); Rule 10(a), *supra*, nt. 2. This proceeding put in issue not the line-haul tariff but the separately stated charge for loading, since the amended tariff made no change in the former. To allow this proceeding to be used to adjust indirectly the line-haul tariff is to circumvent the Act. The difference between the removal of a discrimination and the adjustment or fixing of rates has long been recognized. *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136, 145. The present line-haul rate is a through or joint rate in which carriers other than the appellee roads participate. Those other carriers are not parties to this proceeding; nor does it appear that they have consented to any adjustment of the line-haul rates. Congress has prescribed in § 15(3) how those rates may be adjusted. It may be done only after a "full hearing", which means that all other carriers who are parties to the tariff must be joined. *Stevens Grocer Co. v. St. Louis, I. M. & S. Ry. Co.*, 42 I. C. C. 396, 398; *McDavitt Bros. v. St. Louis, B. & M. Ry. Co.*, 43 I. C. C. 695; *United States v. Abilene & So. Ry. Co.*, 265 U. S. 274, 283, nt. 6; Rules of Practice (I. C. C. 1936), Rule II(c) and (d). And the Commission may then adjust the through rates or joint rates either with or without the consent of the carriers. *St. Louis S. W. Ry. Co. v. United States*, *supra*. On the other hand, the loading charge, like the transit privilege involved in *Central R. Co. v. United States*, 257 U. S. 247, 255, 259, is a

tariff for which other carriers participating in the through or joint rates are not necessarily responsible. In short, Congress has prescribed the procedure for obtaining adjustments of line-haul rates. That method is different from the one provided for adjusting a separate tariff of the kind we have here. We should not allow the procedure for readjusting line-haul rates to be circumvented through the rebate route. Cf. *Central R. Co. v. United States*, *supra*.

The determination by the Commission on the question of discrimination under § 2 is ordinarily a question of fact. *Nashville, C. & St. L. Ry. Co. v. Tennessee*, 262 U. S. 318, 322. Its findings on that issue are entitled to great weight (*Seaboard Air Line Ry. Co. v. United States*, *supra*) and will be given the respect which expert judgment on the intricacies of rate structures deserves. But disregard of the statutory standards is another matter. *Central R. Co. v. United States*, *supra*.

Since I would rest the reversal of the judgment below on § 2, it is not necessary for me to reach the issues raised under § 3.

Mr. Justice ROBERTS, Mr. Justice BLACK and Mr. Justice REED join in this dissent.